No. 48869-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Michael William Richie,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY [1]

1. REVERSAL IS REQUIRED WHERE THE PROSECUTOR COMMITTED REPETITIVE MISCONDUCT BY REPEATEDLY DISPARAGING DEFENSE COUNSEL AND IMPUGNING HIS INTEGRITY DURING CLOSING ARGUMENT THEREBY DENYING RICHIE HIS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL.

The State cites several cases which are not on point, primarily relying on *State v. Carver*, 122 Wn. App. 300, 93 P.3d 947 (2004), which is clearly distinguishable. Brief of Respondent at 7-19. In *Carver*, a bail jumping case, defense counsel informed the court that Carver would likely testify that he forgot he was supposed to be in court and proposed a jury instruction requiring the State to prove that on the day of the hearing, Carver knowingly failed to appear before the court. 122 Wn. App. at 302. In response, the State argued that under the amended statute, the State was required to prove only that Carver was given notice of his court date, not that he had knowledge of the date every day thereafter and "I forgot" was not a defense. The court declined to give defense counsel's proposed instruction, ruling that the statute does not require the State to prove

[1] It should be noted that Respondent's Statement of the Case fails to comply with RAP 10.3(a)(5), which requires a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." The Respondent's Statement of the Case containing argument decrying the defendant while glorifying the employee does not constitute a fair statement of facts and procedure without argument. Brief of Respondent at 1-6.

knowledge of the hearing date on each and every day and claiming to have forgotten is not a defense. The court gave the State's proposed instruction which provided that the State must prove Carver had been released by court order with knowledge that he was required to appear before the court on a subsequent date. *Id.* at 303.

At trial, Carver testified that he did not appear at the subsequent hearing because he forgot. During closing, the prosecutor argued that the jury instructions did not permit a defense of "I forgot." During defense counsel's closing, he argued that Carver did not knowingly fail to appear, he forgot, and forgetting is a mistake not a criminal act. *Id.* at 303-04. The prosecutor argued in rebuttal, "Every word -- almost every word out the Defendant's attorney's mouth in the closing argument is not supported by the law . . . You have to ignore that entire closing argument, that entire call for sympathy." *Id.* at 304.

On appeal, Carver contended that the prosecutor committed misconduct during closing argument by misinterpreting the law and telling the jury to ignore defense counsel's entire closing argument. *Id.* at 304-05. This Court held that the prosecutor's remarks during closing argument were neither improper nor prejudicial. This Court observed that the trial court properly ruled that the State was not required to prove Carver had knowledge that he was to appear on the actual date of his hearing and that

forgetting was not a defense. "Despite these rulings, defense counsel argued to the jury that the State was required to prove that Carver knowingly failed to appear and that because Carver had forgotten about his hearing, he had not committed the crime of bail jumping." *Id.* at 306-07. This Court concluded that the prosecutor was properly responding to, and correcting, defense counsel's misstatements of the law. *Id.* at 307-08.

Unlike in *Carver*, where the prosecutor made a "fair response to the arguments of defense counsel," the prosecutor here wrongfully disparaged defense counsel and impugned his integrity. The record substantiates that unlike defense counsel in *Carver*, defense counsel did not defy the court's ruling or misstate the law. During discussion of the jury instructions, defense counsel argued his theory of the case, disputing the State's argument:

> Your Honor, Mr. Schacht is just plain wrong. The cases that he's handed up support the instruction that I've asked the Court to propound to the jury. *You have to have a superior claim to the property than the robber*, which is precisely what Latham says. By the way, Your Honor, Latham is still good law. That's not a misstatement of the law. Mr. Schacht is completely inaccurate when he says that.
>
> *You have to have some kind of proprietary interest in the property that the person's being deprived of in order to have a robbery*. Latham's quite clear. Latham, Your Honor, the facts in that are the passenger and a driver drive around in a car, somebody hops in their car and steals the car. Mr. Latham checks out on two counts of robbery in the first degree or maybe it was second degree. I don't know. But in any case, the court later threw out the charge as it was as it included the passenger because he did not have a

> proprietary interest in the car. That is the law of the land. It's been the law of the land since 1902. I found a case last night.
>
> *You have to have an interest, as Mr. Schacht has said in all the cases he's cited to you, that's superior to Mr. Richie's.* And, you know, that's a factual issue for the jury to decide. I think, Your Honor, for me to just stand up and argue that without a jury instruction sort of, you know, waters down Mr. Richie's defense. He should have that instruction propounded to the jury because it is an accurate statement of the law and it allows Mr. Richie to argue what it is that he's been hopefully demonstrating through the evidence in this case. I mean, that is his, you know, his last leg.

RP 520-21 (emphasis added).

The court took a recess to read *Latham* and concluded that it agreed with the decision:

> I wanted to read the fact pattern in regards to Latham, and I don't disagree with that ruling in terms of the interpretation as to the passenger who was riding in the vehicle at the time that the car was stolen. I agree with the analysis that that passenger didn't have any interest in the vehicle. He was just a bystander who had no interest in the car. He was just along for the ride and had no possessory interest in the vehicle. . . .

RP 523-24.

Nonetheless, the court declined to give the jury instruction proposed by defense counsel:

> I'm going to -- I'm going to go with the State's definition of theft because I believe it allows -- I think it's a more neutral statement as to ownership, and *I still believe it allows the defense to argue its theory of the case without penalty*, and that will be the ruling of the Court.

RP 524 (emphasis added).

Importantly, the court did not rule that defense counsel's proposed instruction was incorrect, but in fact allowed defense counsel to argue his theory of the case. Therefore during closing argument, defense counsel argued that to prove robbery beyond a reasonable doubt, the State had to show that the victim of the robbery had a proprietary or superior interest in the property that was taken. RP 557-64. Defense counsel argued his theory of the case, which the court ruled he could do without penalty. Contrary to the State's assertion, defense counsel did not misstate the law by "attributing to a trial court's instruction more meaning that its plain language can bear." Brief of Respondent at 12-13.

The State argues further that the second degree assault conviction should be affirmed because the jury's verdict "is seemingly beyond reproach as it is supported by overwhelming evidence of the defendant's guilt." Brief of Respondent at 14-19. The State's argument fails where a similar argument was rejected by the Washington Supreme Court in *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2013). In *Glasmann*, the dissent concluded that three of the four convictions should not be reversed because Glasmann conceded two of the crimes and there was overwhelming evidence of the other crime. *Id.* at 710. The majority held, "We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient." *Id.* at 711. In holding that

Glasmann's right to a fair trial must be granted in full, the majority declared, "In this way, we give substance to our message that 'prejudicial prosecutorial tactics will not be permitted,' and our warnings that prosecutors must avoid improper, prejudicial means of obtaining convictions will not be empty words." *Id.* at 712-13 (quoting *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978)).

Reversal is required where by repeatedly disparaging defense counsel and impugning his integrity, the prosecutor's misconduct tainted the entire proceedings, depriving Richie of his constitutional right to a fair trial and effective assistance of counsel.

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE RICHIE REMAINS INDIGENT.

The State's argument that there is no injustice in imposing appellate costs is misguided and should be rejected by this Court. Brief of Respondent at 19-21. It is well established that "Washington's Const. art I, section 22 (amendment 10) grants not a mere privilege but a 'right to appeal in all cases.' " *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978)(quoting *State v. Schoel*, 54 Wn.2d 388, 341 P.2d 481 (1958)). In honoring this right, the Washington Supreme Court emphasized that the

"presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court." *Id.*

Richie exercised his constitutional right to appeal as he is entitled to do, especially when he has been sentenced to life in prison without the possibility of parole. Unlike in *Caver*, where the defendant was 53 years old and in jail for 90 days, and more like *Sinclair*, where the defendant was 66 years old and sentenced to 280 months in prison, there "is no realistic possibility" that Richie could pay appellate costs. *State v. Caver*, 195 Wn. App. 774, 785-87, 381 P.3d 191 (2016); *State v. Sinclair*, 192 Wn. App. 380, 393-94, 367 P.3d 612 (2016). The State cites no authority for its contention that "it is just for a recidivist offender to be compelled" to pay costs.

In light of no evidence provided to this Court, and no findings by the trial court, that Richie's financial condition has improved or is likely to improve, this Court should not award costs because Richie is presumably still indigent.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Richie's conviction for assault in the second degree because prosecutorial misconduct fundamentally undermined the fairness of the trial. *State v. Davenport*, 100 Wn.2d 757, 761-63, 675 P.2d 1213 (1984).

In the event the State substantially prevails on review, this Court should exercise its discretion and deny any requests for costs.

DATED this 8th day of February, 2017.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney for Appellant, Michael William Richie

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office and by U.S. Mail to Michael William Richie, DOC # 708322, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of February, 2017.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE

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